Supreme Court, U.S.
FILED
FEB 7 1979
MICHAEL RODAK, JR., CLERK

No. 78-857

In the Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

YESHIVA UNIVERSITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

JOHN S. IRVING
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-875

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

YESHIVA UNIVERSITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

---

1. Respondent contends that no issue warranting review is presented because the court of appeals' holding that the faculty at Yeshiva are managerial or supervisory personnel, and thus exempt from the National Labor Relations Act, is "limited to the particular facts of this case" which depict a "unique university" (Br. in Op. 14). Respondent further attempts to minimize the significance of the decision below by arguing that the court merely found that the Board's "conclusory findings have no basis in the record" (*id.* at 13). Respondent is mistaken in these assertions.

While the court of appeals purported "to address [itself] solely to the situation at the institution involved in this proceeding" (Pet. App. 22a), the elements of faculty responsibility and participation on which the court relied in finding managerial or supervisory status are, as the Board noted in its decision (Pet. App. 68a), essentially the same as those found in other universities. Moreover, as shown

in the petition (pages 17-25), the basic difference between the Board and the court is not over the facts, but over the legal conclusion to be drawn from those facts.[1]

Respondent points out (Br. in Op. 14) that the court of appeals found that the Yeshiva faculty play an important role in decision-making regarding such matters as the hiring, compensation, and tenure of one another, as well as the establishment of curriculum and academic and admissions standards. The Board did not find otherwise. It concluded, however, that the role that the faculty played in the decision-making process affecting such matters did not make them managerial or supervisory employees because they were not aligned with the University administration in carrying out their responsibilities (Pet. 21-23). Similarly, respondent notes (Br. in Opp. 11) that the court found that the record "establishes no significant divergence between the interests of the faculty and those of the administration" on such matters. Again, the Board did not find otherwise. Rather, in the Board's view, it is not the fact of agreement or disagreement on particular issues that determines alignment, but whether the faculty is advocating its own interests or those of management and whether they are accountable to management for their opinions on such matters (Pet. 22-25).

The important difference between the Board and the court of appeals over the legal significance to be attached to basically undisputed facts regarding the managerial or supervisory status of faculty members warrants resolution by this Court. None of the alleged peculiarities at Yeshiva University pointed to by respondent or the court of appeals is material to the rationale of the Board's decision

[1]The facts referred to in our petition are based on testimony and exhibits presented by respondent in the Board's representation proceeding. They do not conflict with the facts described by the Second Circuit. Respondent's brief in opposition does not dispute the accuracy of the facts we have cited.

in this and similar cases. In view of the similarity between this and other cases involving university faculty members, the decision below, if allowed to stand, would upset collective bargaining relationships at other universities.

2. Equally insubstantial is respondent's contention (Br. in Opp. 22-23) that certiorari should be denied because the Board's decisions with respect to faculty members have been "internally inconsistent," and the Board, instead of analyzing the facts of this particular case, applied "rigid criteria" developed in earlier decisions. As shown in the petition (pages 13-14 n.12), the Board has consistently held that faculty members are employees within the meaning of the Act; respondent cites no case to the contrary. Moreover, because the Board accepted respondent's basic factual contentions but nonetheless concluded that the role of the faculty here was similar to that in other universities, there was no need for a detailed discussion of the facts or of applicable legal principles. The Board adequately explained the basis for its decision by referring to its prior relevant decisions and by summarizing the principles enunciated in those cases (Pet. App. 67a-68a & nn. 5-6). Finally, the analysis in the petition is not "appellate counsel's *post hoc* rationalization for agency action" (Br. in Opp. 23). Rather, it is a description of the underlying reasoning applied by the Board in this and its earlier cases.[2]

[2]The Board is not to be faulted for determining the employee status of university faculty members in an adjudicatory proceeding rather than a rule-making proceeding (Br. in Opp. 22). The Board has discretion to proceed by adjudication in this area. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 290-295 (1974).

For these reasons, as well as those set forth in the petition, we respectfully submit that the petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.
Solicitor General

JOHN S. IRVING
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

FEBRUARY 1979

DOJ-1979-02